**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **JAMES W. BURRESS**<br>Claimant<br>VS.<br><br>**RICKERT INDUSTRIAL COATINGS**<br>Respondent<br>AND<br><br>**HOME INDUSTRIAL COATINGS**<br>Insurance Carrier | ) | Docket No. 206,007 |

## ORDER

Claimant appeals from a preliminary hearing Order of January 16, 1996, wherein Administrative Law Judge John D. Clark denied claimant compensation for an alleged injury occurring on July 21, 1995, refusing to apply the "last injurious exposure rule" finding claimant was not working for respondent on the date of injury and finding he did not have jurisdiction over Docket Number 169,853 without an agreement of all parties to accept both a consolidation of the cases and the jurisdiction of the Court.

### ISSUES

(1) Whether the Administrative Law Judge erred in finding that the "last injurious exposure rule" of Helms v. Tollie Freightways, Inc., 20 Kan. 2d 548, 889 P.2d 1151 (1995), does not apply;

(2) Whether the Administrative Law Judge erred in assuming that the "last injurious exposure rule" does not apply to a successor employer to the original employer-respondent, when that successor employer both employed claimant for a time after the initial injury and also has merely obtained either a time limited license or franchise to operate certain portions of the original employer-respondent's business; and

(3) Whether the Administrative Law Judge erred in finding that venue and jurisdiction for "all issues" relating to the claimant's later injury which occurred during medical treatment in Sedgwick County, Kansas, had to be the same as the venue and jurisdiction for the initial injury which occurred in Ford County, Kansas.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

In order to fully understand the issues raised by the claimant on appeal, a detailed discussion of the facts is necessary in this matter. Claimant worked for respondent Bob Eisel Industrial Coating (hereafter Bob Eisel) in 1991. On October 15, 1991 claimant suffered accidental injury to his knee arising out of and in the course of his employment with Bob Eisel. The claim was filed by claimant and litigated in Docket Number 169,853. Respondent, Bob Eisel, informed its insurance company, Continental National American Group and benefits commenced. As a result of the knee injury, claimant developed low back symptomatology. Claimant was provided medical treatment with Dr. Murphy for his knee injury and Dr. Ozanne for his back injury and was paid temporary total disability compensation. Claimant was returned to work with Bob Eisel in July 1992. On July 28, 1992, unbeknownst to the claimant, a portion of Bob Eisel's business was purchased by respondent, Rickert Industrial Coatings (hereafter Rickert). Claimant continued to work for Rickert through August 29, 1992, at which time he was laid off due to lack of work. Claimant's return to work had been with accommodation based upon the restrictions placed upon him by the authorized treating physician. Subsequent to his layoff claimant underwent several surgeries both to his knee and his low back under the authorized care of Dr. Murphy and Dr. Ozanne. Claimant was paid temporary total disability benefits by respondent Bob Eisel and CNA Insurance during this period of time. The evidence is uncontradicted that claimant suffered no injury during the time he worked for Rickert in July and August of 1992. The testimony of claimant indicates claimant was not even aware of the transfer of business as his checks continued to be paid from Bob Eisel.

Claimant's condition subsequent to the surgeries did not improve as expected and claimant was referred to a pain management and physical therapy program by Dr. Ozanne in 1995. While undergoing the pain management and physical therapy program, claimant was involved in several physical exercise programs. While exercising in his pain management class, claimant felt a “pop” in his neck and experienced a burning sensation in his neck, shoulder and arm. He also testified that his little finger went numb at that time. While claimant was undergoing this pain management program he was unemployed, having been laid off by Rickert in August 1992.

The dispute in this matter deals with the party responsible for providing medical care as a result of additional trauma to claimant's cervical spine suffered during the exercise program during pain management. Claimant has been provided medical treatment and has been paid temporary total disability by Bob Eisel and CNA Insurance in Docket Number 169,853 through the litigation of this matter. Respondent, Rickert, denies liability, arguing that claimant's injury on July 21, 1995, stemmed from the original injury suffered by claimant in 1991. This matter came before Administrative Law Judge John D. Clark on January 16, 1996. Claimant requested a consolidation of the two cases in order that all parties including both respondents, both insurance companies and the Kansas Workers Compensation Fund could be brought under the Court's jurisdiction. Both the respondent, Bob Eisel, and the Kansas Workers Compensation Fund, impleaded only in Docket Number 169,853, objected to the consolidation of cases and raised timely objections to the Court's jurisdiction to include them in this litigation.

Respondent, Bob Eisel, argued that as claimant was not working for Bob Eisel at the time of the 1995 incident, and as claimant worked for respondent, Rickert, subsequent to working for Bob Eisel, the "last injurious exposure rule" set out by the Court of Appeals in Helms should apply and the liability should be assessed against Rickert.

The Administrative Law Judge denied liability against Rickert finding the "last injurious exposure rule" did not apply as claimant was not working for Rickert at the time the 1995 injury occurred. The Administrative Law Judge also found he had no jurisdiction to enter any rulings against either Bob Eisel, its insurance company, CNA, or the Kansas Workers Compensation Fund, as they had refused to accept the jurisdiction of the Administrative Law Judge and had further refused to allow these matters to be consolidated in Sedgwick County, Kansas. The parties were directed to litigate the matter in Ford County, Kansas.

The Appeals Board finds that the evidence supports the contention of Rickert. First, claimant was unaware of the transfer of business and also unaware that he was employed at any time with Rickert. The evidence further supports Rickert's contention that claimant suffered no injury during his employment with them. The evidence indicates that, while certain aspects of the business of Bob Eisel were sold to Rickert in 1992, Rickert inherited none of the liability of Bob Eisel from this sale.

The Appeals Board must consider whether the "last injurious exposure rule" of Helms, *supra*, should apply to this matter. In Helms the claimant suffered accidental injury while working for respondent. She underwent an extensive period of medical treatment during which time respondent changed insurance carriers. Helms dealt with which insurance carrier should be liable for injuries suffered by claimant in an automobile accident while traveling to and from physical therapy. The Court of Appeals, in reversing the Appeals Board in Helms, found the new injury could not be the responsibility of the insurance company providing coverage at the time of the original injury. The Appeals Board had relied upon the case of Roberts v. Krupka, 246 Kan. 433, 790 P.2d 422 (1990), in assessing the entire liability to the insurance company with coverage at the time of the original injury. The Court of Appeals found that equating the risk of malpractice discussed in Roberts, during treatment of the original injury, with the risk of a vehicular accident when traveling to and from a physician's office, stretches the doctrine in Roberts too far.

In this matter, the factual scenario set out is more in line with the facts found in Roberts rather than Helms. In Roberts claimant underwent treatment for a work-related injury and, as a result of the malpractice of the doctor, suffered additional debilitating injuries. The Supreme Court in Roberts concluded that, where an injury is compensable under the Workers Compensation Act, any aggravation of that injury or additional injury arising from medical malpractice during the treatment thereof, is a consequence of the primary injury and compensable under the Act.

In this case the Appeals Board is presented with a claimant who, while undergoing pain management for an injury in 1991, suffered additional debilitating injury to his cervical spine. The Court of Appeals in Helms rejected Roberts because the risk of a vehicular accident when traveling to and from the physician's office was too far removed from the treatment itself. In both Roberts and here the claimant was undergoing medical treatment when additional trauma occurred. It should also be noted that in Helms that claimant continued to work for the respondent, although off work on temporary total disability compensation, while in this case, claimant was laid off nearly three years prior to the

additional injury in 1995. The Appeals Board finds the logic of Roberts to be more in line with this case scenario in finding that claimant's accidental injury of July 21, 1995, is the consequence of the primary injury and compensable under the Workers Compensation Act with the liability being the responsibility of the original respondent, Bob Eisel.

(2) Here, claimant also attempts to attach the "last injurious exposure rule" to a successor employer. Again, the distinction between Helms and this matter is significant. In Helms the claimant continued to be employed by the original respondent with the only dispute being which insurance carrier would be liable. Here claimant was not employed at the time of the injury in July 1995. Should the Appeals Board apply the "last injurious exposure rule" under the logic of Helms then there would be no respondent against whom claimant could claim responsibility for the 1995 injury to his neck. The original respondent, under the logic of Helms, would not be liable and claimant's second respondent, Rickert, would also not be responsible as no evidence has been presented to show claimant suffered accidental injury arising out of and in the course of his employment with Rickert. As such, the Appeals Board finds the "last injurious exposure rule" inapplicable to this case.

(3) The Administrative Law Judge did not exceed his jurisdiction in finding that "all issues" relating to claimant's injury of 1995 must be litigated in Ford County, Kansas. While claimant moved to consolidate this matter, both respondent, Bob Eisel, and the Kansas Workers Compensation Fund refused to agree to this consolidation. Absent an agreement of the parties, the Administrative Law Judge, in Docket Number 206,007 was correct in holding that he has no jurisdiction over the parties in Docket Number 169,853.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated January 16, 1996, should be, and is hereby, affirmed in all respects and remains in full force and effect.

**IT IS SO ORDERED.**

Dated this ____ day of March 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Norman I. Cooley, Wichita, KS
Kevin J. Kruse, Overland Park, KS
Gregory D. Worth, Lenexa, KS
Joel P. Hesse, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director